No. 2935

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustees for Said S. M. KANAKANUI,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Appeal from the United States District Court of the Territory of Hawaii.

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F. D. Monckton,
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JOHN W. PRESTON,
United States Attorney
For the Northern District of California,
ED F. JARED,
Asst. United States Attorney
For the Northern District of California.
Attorneys for Defendant in Error.

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STATEMENT OF THE CASE.

This is an action at law brought in the United States District Court of the Territory of Hawaii, to recover damages from the United States arising from proceedings to condemn certain land of the plaintiffs.

The condemnation suit was brought under the authority of the Act of August 18, 1890 (26 Stats. at Large, p. 316) which reads in part:

> "The Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted."

The plaintiff's grounds of recovery are based, first: upon the Fifth Amendment of the Constitution of the United States; second, upon a contract, expressed or implied; and third: under a law of Congress, which it is insisted embraces the condemnation laws of the Territory of Hawaii, and particularly Section 505 of the Revised Laws of Hawaii, now Section 676 of the Laws of 1915, which read as follows:

> "The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure so to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per

cent. per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court, reasonable expenses and such damage as may have been sustained by him by reason of the bringing of the action."

Plaintiffs' complaint alleges that on September 7, 1911, a decree was entered in those proceedings condemning the right, title and intrest of the plaintiffs for the public use of the United States in ordering that their right, title and interest should vest in the United States upon the payment of an award of Five Thousand Dollars ($5,000) damages; that no part of this award has been paid and the two years' period fixed by the Hawaiian Statute within which such award should be paid has elapsed, and under the statute all rights obtained by the United States in the above decree have been lost; and that "by reason of the law and particularly by reason of section 505 of the Revised Laws of Hawaii, 1905," the plaintiffs "are entitled to recover their costs of court, reasonable expenses and such damages as they have sustained by reason of the bringing of said action for condemnation."

The specific amounts claimed under complaint were $1,100 for attorney's fees in the preparation and trial of the condemnation suit; $64.85 for witness fees and other expenses, $5,000 damages for the

loss of the use of the condemned property, and interest on the award of $5,000 at seven per cent per annum.

The Government interposed a demurrer to the complaint setting up several grounds wherein its principal objection was that the facts set out in the complaint were insufficient to show a substantial cause of action. The demurrer was sustained and the judgment was entered in favor of the Government and it is now before this Court upon a writ of error to review the said judgment.

ARGUMENT.

There being no facts set out in the complaint sustaining an allegation of an expressed contract, or that the land was taken, grounds One and Two upon which recovery was based must fail.

The Government concedes that if the land was taken either in whole or in part, it would be obligated upon the principle that the Government, by the very act of taking impliedly, has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require.

U. S. vs. *Great Falls Mfg. Co.,* 102 U. S. 645, 656,

U. S. vs. *Lynah,* 188 U. S. 445, and 465.

The only attempt of an allegation in the complaint of the taking of the land by the Government

is the averment that a judgment was entered in the condemnation proceedings.

Mr. Lewis in his work on Eminent Domain, Section 655 (3rd Ed.) says:

> "The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceeding for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment, the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded."

In a very recent case, *U. S.* vs. *W. R. Cress,* (decided March 12, 1917), the Supreme Court, speaking through Mr. Justice Pitney, said:

> "It is the character of the invasion, not the amount of damages resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

If a condemnation suit for the purpose of fixing the price of land sought is a direct invasion of the land of the plaintiff, then the defendant would be liable for damages. If not, whatever damage is brought out by such proceedings would be consequential and no right to compensation would exist.

> "Taking under the power of eminent domain, may be defined as entering upon private property for more than a momentary period, under

the warrant of color of legal authority, diverting it to a public use or otherwise informally appropriating or injuriously affecting it in such a way as *substantially to oust the owner and deprive him of all beneficial enjoyment thereof.*"

10 *R. C. L.* 66

Fruth vs. *Charleston,* 84 S. E. 105

L. R. A. 1915, C 981.

It was said in the case of *Lamb* vs. *Schottler, et al,* 54 Cal. 319, at page 327:

"The right of the State to take private property for public use in no sense depends upon any contract between the owner and the public. Nor is there any vested right to compensation, until the property is taken; nor is the Government under any obligation to take the property if the terms when ascertained are not satisfactory."

The Appellate Court of California, said in the case of *Los Angeles* vs. *Gager,* 10th Cal. Appellate, page 382:

"Until a citizen is deprived of compensation of property sought to be condemned, his right to the use and acknowledgment thereof as it stood at the time of commencing the action is in no wise abridged. Therefore, it cannot, in a legal sense be said that he is damaged until the actual taking of the property."

If this theory was not true, the avenues of public improvement would almost be blockaded for the Government could not afford to ascertain the value of the property through condemnation for public improvement if it was compelled to take the property at unreasonable prices or forced to pay damages for not taking it.

The Court below in its very learned and comprehensive opinion, said upon this subject:

> "There was certainly no taking of the particular property sought to be condemned. The proceedings were only preliminary to a taking. See *U. S.* vs. *Dickson,* 127 Fed. 775; *Lamb* vs. *Schlottler,* 54 Cal. 319, 327; *Stevens* vs. *Borough of Danbury,* 22 Atl. 1971; *Carson* vs. *City of Hartford,* 48 Conn. 68, 87, 88 and other cases discussed hereinbelow."

I have not been able to find, nor has the plaintiffs' counsel in his very exhaustive search, been able to show any statute or any case in which the Government would be held liable for damages in not taking the initiative steps to set aside or abandon a judgment in condemnation of lands.

> "The power to inflict damage upon private property without rendering compensation is an extreme exercise of the sovereign powers not to be assumed to have been granted to private parties in the absence of specific legislative enactment; and so, power granted to private corporation to construct a public work authorizes no injuries not necessarily incident to the

construction of such work. For other injuries occasioned, even though there be an absence of negligence, the corporation is liable to the same extent as a private owner. THIS RULE, HOWEVER, HAS NO PERTINENCY TO A CASE WHERE THE GOVERNMENT ITSELF SEEKS, BY APPROPRIATE MEANS PLAINLY ADAPTED TO THE END, TO ACCOMPLISH FOR THE PUBLIC BENEFIT ANY OF THE OBJECTS CONFIDED TO ITS JURISDICTION."

10 *R. C. L.* 67

Benner vs. *Atlantic Dredging Co.*

134 N. Y. 156, 31 N. E. 328.

It is true that certain statutes of states hold individuals, corporations, and even the state itself liable to such damages. The state is held impliedly upon the theory that it is bound by the acts of its own legislature.

Deneed vs. *Unverz Agt.*, 80 N. E. 321.

The word "taken", as used in the Fifth Amendment of the Constitution with the provision that just compensation must be made, means the property actually invaded and appropriated. A concrete example is found in the case referred to above, *U. S.* vs. *W. R. Cress,* in which the Court said:

"Where the Government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the

scope of the Fifth Amendment. While the Government is not directed to proceed to appropriate the title it takes way the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course it results from this that the proceeding must be regarded as an actual appropriation of the land including the possession, the right of possession and the fee."

I am unable to find any decision of the Supreme Court of the United States holding the Government liable except such physical invasion.

The Circuit Court of Appeals said in the case of *U. S.* vs. *Dickson,* 127 Fed. 775:

> "No physical interference has been made with the property, nor has there been a taking of the same in any legal sense; and unless in some way unknown to the Court, the United States can be compelled to take the property at the owner's valuation, it is perfectly plain that these suits form no exception to the general rule."

So, as stated above, if there was no taking there could be no recovery under the Tucker Act relative to the Fifth Amendment, or to an implied contract.

While there is no direct allegation of an expressed contract in the plaintiffs' complaint, it is argued by plaintiffs that it was made so by law, that is, by the Act of Congress of August 18, 1890, wherein the said Act directed condemnation proceedings to be prosecuted in accordance with the local laws. For

this reason it is claimed that Section 505 of 1905 of the Revised Laws of Hawaii was incorporated in said Act and that the Government under that Section assumed the obligation that is here claimed.

While this feature of their claim will be met later on, I desire at this point to call the Court's attention to the case of *Lamb* vs. *Schottler,* 54 Cal., p. 327, in which the Court said:

> "The Act provides (referring to the Eminent Domain Act) for the taking of private property for public use. When in the exercise of its sovereign right of eminent domain, the State takes the property of a person he has but one right—that is given to him by the Constitution—the right to compensation before he is deprived of his property. The right to take his property in no sense depends upon any contract between him and the public. His assent is not required and his protestations of no avail, but under the Constitution his property cannot be taken until paid for. Up to that time he holds it as he always held it subject to the right of the State to take it for public use upon compensating him for it."

ABANDONMENT—It is insisted by the plaintiffs that the Government by not abandoning the condemnation suit within reasonable time after judgment, caused damages to plaintiffs. If this be true, the approximate cause of the damages was the wrongful act of the Government and no recovery could be made as such claim, as sounding in tort is expressly disallowed.

The Supreme Court of Illinois said in a case of *Chicago etc. Company against Chicago,* 143 Ill. p. 641, as follows:

> "A municipal corporation seeking to condemn real estate for public use may, after the assessment of damages and judgment of condemnation, abandon the enterprise in aid of which the condemnation is sought and unless, within a reasonable time, the damages are paid and possession taken of the property condemned, the proceedings will be regarded as abandoned."

To the same effect is

Bensley vs. *Mountain Lake Water Co.,* 13 Cal. 307, 317,

St. Louis etc. R. R. Co. vs. *Tetters,* 68 Ill. 144, 150,

Pool vs. *Butler,* 141 Cal. p. 53.

Nichols, in his work on Eminent Domain, Section 342, subject, Evidence of Abandonment, says:

> "When the statutes specify a period within which compensation must be paid, possession, taking, or some other act done, the expiration of the period without the performance of the statutory requirement, constitutes an abandonment."
>
> (Cite authorities)
>
> "In the absence of such provisions abandonment may be inferred from failure to take pos-

> session and pay the damages within reasonable time."
>
> (Cite several authorities.)

The third and last ground upon which the plaintiffs bases a recovery is *under a law of Congress.* It is argued by the plaintiffs as the condemnation suit was instituted under the said Act of August 18, 1890, that Section 505 which has been quoted above, was incorporated and made a part of the Act for the reason that it directed such proceedings to be prosecuted in accordance with the laws relating to suits for condemnation of property of states wherein the proceedings may be instituted.

The Court below said, correctly, I believe, (Trans. p. 20)

> "The provision that 'such proceedings' are 'to be prosecuted' in accordance with the eminent domain laws, is merely a provision adopting local procedure—a provision not needed in view of the 'conformity' statute, Rev. Stat. Sec. 914, *Judson* vs. *United States,* 120 Fed. 637, 642-643; while, on the other hand, the provision of section 505 of the Revised Laws of Hawaii, 1905, allowing damages, expenses, and costs against the government is a provision of substantive law, rather than of procedure."

I do not think it could be logically contended but what the Federal Act relative to condemnation proceedings, wherein it directs a prosecution in accordance with the local law meant anything but a repeti-

tion or reassertion of the Conformity Act. This is the interpretation by the 2nd Circuit Court of Appeals in the case of *Carlisle* vs. *Cooper,* 64 Fed. p. 472 at p. 475. It was insisted in that case, in which the Government had abandoned the condemnation suit, that it should pay the cost and other actual expenses. The Court said:

> "Congress could not have supposed that its remedial legislation would permit judgment against the Government for damages or costs. If any such suggestion had been made, it would have been met by the consideration that any attempt, in state codes or practice acts, to accomplish that result, would be nugatory legislation."

In other words, that part of the Federal Statute means, and only means, that you are to follow the adjective or remedial law relating to the local statutes and not the substantive, as here insisted by the plaintiffs.

I have been unable to find any decision in the Courts that place a different construction. It was said by the Supreme Court in the case of *Nudd* vs. *Burrows,* 91 U. S. p. 441, that the purpose of the statute was—

> "To bring about uniformity in the law of procedure in the Federal and State Courts for the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law pleadings forms and practice were adhered to, in

the State Courts of the same district, the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both".

The Conformity Act does not apply where Congress has legislated.

Pentlarge vs. *Kirby,* 20 Fed. 899,

Eastern vs. *Hodges,* 7 Biss. 324,

McNutt vs. *Bland,* 2 How. 17,

U. S. vs. *Pings,* 4 Fed. 715.

Congress has very specifically legislated upon the subject of costs against the Government. Section 152 of the Judicial Code which was re-enacted from the Tucker Act says:

"If the Government of the United States shall put in issue the right of the plaintiff to recover, the Court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the Clerk of the Court.

It was said in the case in *re Williams,* 120 Fed. p. 36 that

"In the absence of a statute providing for the allowance of counsel fees and expenses, it is the settled rule of national courts that none can be allowed."

It was said in the case of *Scully* vs. *U. S.,* 197 Fed. p 346 that

> "No judgment for interest can be rendered against the Government unless interest has been provided for either in the contract or by statutes".

(With numerous citations.)

For these reasons we submit that the judgment of the lower court should be sustained.

Respectfully submitted,

John W. Preston,
United States Attorney,
For the Northern District of California,

Ed. F. Jared,
Asst. U. S. Attorney,
For the Northern District of California,

Attorneys for Defendant in Error.